Supreme Court, U.S.
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No. ———

In The Supreme Court of the United States

October Term, 1995

Staff Sergeant Renice L. Freeman,
Petitioner,

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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October 1995

QUESTIONS PRESENTED

Can a military member's immediate commander ever be sufficiently neutral and detached, as required by the Fourth Amendment of the U.S. Constitution, so as to issue a search warrant based upon probable cause.

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STAFF SERGEANT RENICE L. FREEMAN,
Petitioner,

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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Staff Sergeant Renice L. Freeman, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 1 August 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 42 M.J. 239 (1995), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review issued on 15 June 1995 is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 18 August 1995. The jurisdiction of this Court is invoked under 28

U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

CONSTITUTIONAL AND EXECUTIVE ORDER PROVISIONS INVOLVED

Constitutional Provision: The Fourth Amendment of the Constitution of the United States provides

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Executive Order: Military Rules of Evidence, Rule 315(d)(1). The relevant portion of Rule 315(d)(1) provides "authorization to search pursuant to this rule may be granted by an impartial individual in the following categories: (1) Commander. A commander . . . who has control over the place where the property or person to be searched is situated or found. . . ."

STATEMENT OF THE CASE

On 19, 20 and 21 November 1991, a general court-martial composed of officer members tried the appellant at Luke AFB, Arizona. Contrary to his pleas he was found guilty of driving drunk, possession of cocaine, use of cocaine, writing bad checks and dishonorable failure to pay debts. He was sentenced to a bad conduct discharge, confinement for 24 months, forfeiture of $400.00 pay per month for three months and reduction to airman basic.

Prior to entering his pleas the defense moved to suppress the urinalysis results which supported the conviction for the use of cocaine specification. The basis of the motion was that the commander who authorized the probable cause search was the appellant's immediate commander

and that he had not remained sufficiently neutral and detached so as to authorize a probable cause search warrant. The trial judge concluded that despite the commander's efforts to learn more about the appellant by discussing him with his supervisor and reviewing his personnel files that he had remained neutral and detached and thus could authorize the search.

In resolving this issue adversely to appellant, the Air Force Court of Military Review concluded:

> The commander did not engage in the prohibited practice of becoming personally involved in an evidence gathering process which gave rise to the incriminating test results. His examination of appellant's squadron personnel records and the civilian police report, and directing appellant to provide a urine sample were routine functions which are expected to be exercised by any commander or magistrate who is called upon to make a probable cause determination.

United States v. Freeman, ACM 29714 at 2 (A.F.C.M.R. 15 June 1993).

The Court of Appeals, in affirming the findings and sentence, concluded that the commander ". . . was a neutral and detached magistrate within the meaning of the Fourth Amendment and Mil. R. Evid. 315(d). *U.S. v. Freeman*, 42 M.J. 239, 243 (1995)

REASON FOR GRANTING THE WRIT

In *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369 (1947), the Supreme Court held *inter alia* that a search authorizing official must be "neutral and detached." * The requirement for a neutral and detached

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* Whether the Fourth Amendment applies to members of Armed Forces may be a question over which there is considerable doubt. For example, Judge Crawford in *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992) states ". . . the Supreme Court has never

magistrate for purposes of a search authorization was specifically recognized by this Court in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979). "The 1984 Manual (Mil. R. Evid. 315(d)) added the requirement of impartiality which was intended to incorporate the neutral-and-detached standard of *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)."

The appellant submits that the Court of Appeals decision that a commander may authorize a search, so long as they remain neutral and detached, begs the ultimate issue. That is, can a commander *ever* be neutral and detached? Judge Cox in his concurring opinion in the case, *sub judice*, acknowledges that in his opinion the term "neutral and detached commander" is an oxymoron. *United States v. Freeman*, 42 M.J. 239, 243 (1995). Judge Cox recognizes in his concurrence what every military commander knows. The responsibilities of command are completely inconsistent with the Fourth Amendment standard of neutral and detached.

CONCLUSION

The Court of Appeals noted in their opinion that "A military commander plays a number of roles in our military justice system." *Freeman* at 243. Appellant submits that this Court should recognize the inherent inconsistencies between a commander's role in discipline and his ability to authorize a search of a service person's protected

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expressly applied the Bill of Rights to the military, but has assumed they applied." *Id.* at 41. Chief Judge Sullivan cites the Supreme Court's plurality opinion in *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) and two remand orders from the Supreme Court in support of his position that the issue is not unresolved. *Lopez* at 48. Judge Wiss also citing the *Burns* decision states that ". . . unless and until the Supreme Court of the United States hold otherwise, the law of this Court *closes* this question." *Lopez* at 49. Finally, Judge Cox believes that the Fourth Amendment should only be applied to the extent that it prohibits unreasonable searches and seizures within the context of expectations in the military.

effects. Commanders should be prohibited, as a matter of law, from serving as search warrant magistrates.

Respectfully submitted,

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October 1995

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 94-0004
CMR No. 29714

UNITED STATES,
Appellee

v.

RENICE L. FREEMAN,
Staff Sergeant
U.S. Air Force,
Appellant.

Argued Jan. 11, 1995

Decided Aug. 1, 1995

Opinion of the Court

SULLIVAN, Chief Judge:

1. On November 21, 1991, at Luke Air Force Base, Arizona, appellant was found guilty of operating a vehicle while drunk; separate specifications of possessing and using cocaine; writing 6 checks with insufficient funds for payment on their presentment (alleged in 2 specifications); and dishonorably failing to pay a debt, in violation of Articles 111, 112a, 123a, and 134, Uniform Code of Military Justice, 10 USC §§ 911, 912a, 923a, and 934, respectively. His general court-martial composed

of officer members sentenced him to a bad-conduct discharge, confinement for 24 months, forfeiture of $400 pay per month for 3 months, and reduction to the grade of E-1. On January 28, 1992, the convening authority approved the sentence. The Court of Military Review * on June 15, 1993, modified one of the findings related to his failing to pay a debt but affirmed the remaining findings of guilty. It then reassessed the sentence based upon the modified findings and concluded that the adjudged sentence approved by the convening authority was appropriate.

2. On March 16, 1994, this Court granted review on the following issue:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING THE DEFENSE MOTION TO DISMISS SPECIFICATION 2 OF CHARGE II BASED ON THE FACT THAT THE SECTION COMMANDER, WHO AUTHORIZED THE SEIZURE OF APPELLANT'S URINE, HAD TAKEN AN ACTIVE ROLE IN PERFORMING A PRELIMINARY INVESTIGATION IN THE CASE AND HAD DIRECTED A FURTHER INVESTIGATION IN THE CASE AND THUS WAS NOT NEUTRAL AND DETACHED WITHIN THE MEANING OF MIL.R.EVID. 315.

We hold that the military judge did not err in holding that the seizure of appellant's urine was ordered by a commander who was neutral and detached within the meaning of the Fourth Amendment and Mil.R.Evid. 315, Manual for Courts-Martial, United States, 1984. *See United States v. Ezell*, 6 MJ 307 (CMA 1979); *United States v. Drew*, 15 USCMA 449, 35 CMR 421 (1965).

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* *See* 41 MJ 213, 229 n. * (1994).

3. The military judge made the following factual findings concerning the defense motion to dismiss the drug-use specification in this case:

> Regarding the defense motion to dismiss Specification 2 of Charge II, I find:
>
> [a] Captain David Pfaffenbichler is the Squadron Section Commander for the 58th Medical Group at Luke Air Force Base, Arizona. [R. 14.] The accused is assigned to the 58th Medical Group and was subject to the command of Captain Pfaffenbichler at all times relevant to this issue.
>
> [b] On 2 June 1991, at about 0125 hours, Staff Sergeant Renice L. Freeman (the accused) was arrested by Peoria, Arizona police officers for driving while intoxicated and transported to a Maricopa County Jail.
>
> [c] Incident to a search of the accused's personal effects, a white powdery substance and a plastic straw were found in a plastic bag in a fanny-pack taken from him that night. The substance was field tested by Peoria Police Officer Robertson and tested positive for cocaine.
>
> [d] In the early morning hours of 2 June 1991, Sergeant Freeman's First Sergeant, Master Sergeant Busse, was notified of the accused's arrest. Sergeant Busse waited until daylight hours before calling then Lieutenant [1st Lt.], now Captain Pfaffenbichler, 832 Medical Group [became the 58th on Oct. 1, 1991] Squadron Section Commander to inform him of the accused's arrest for driving while intoxicated and possession of cocaine.
>
> [e] Captain Pfaffenbichler is the accused's squadron section commander.
>
> [f] The accused was released from jail on 2 June 1991, and ordered by Sergeant Busse to report to

Captain Pfaffenbichler at 0730 hours the next day which was Monday, 3 June 1991.

[g] The accused reported as ordered to Captain Pfaffenbichler at 0730 hours, whereupon Captain Pfaffenbichler advised the accused he was suspected of driving while intoxicated, wrongfully possessing and using cocaine, and given Article 31(b) [, UCMJ, 10 USC § 831(b)] rights' advisement. *Immediately thereafter, Captain Pfaffenbichler ordered the accused to report to Special Agent McGinnes at the OSI [Office of Special Investigations] building. Captain Pfaffenbichler did not ask any questions of the accused at that time. The accused indicated he was willing to answer questions and waived his right to consult counsel.* Master Sergeant Busse had talked with Special Agent McGuinnes [sic] of the AFOSI who indicated he was willing to investigate the case.

[h] Captain Pfaffenbichler and/or Master Sergeant Busse contacted the reports section (SPOI) at the Security Police Squadron [(SPS)] at Luke Air Force Base to secure a copy of either the Peoria Police report of the arrest of the accused, or a copy of the AF Form 1569 relating the incident. Captain Pfaffenbichler has no current memory of who made the contacts with SPOI, but indicates he may have called at least once. A recent review of the file he maintained on the accused for this incident indicates he received only the Form 1569 as information of the arrest downtown.

[i] Captain Pfaffenbichler requested and reviewed the accused's Personal Information File (PIF), and found evidence of financial difficulties experienced by the accused.

[j] Captain Pfaffenbichler summoned Master Sergeant Ackert, the accused's immediate supervisor, and questioned him about Sergeant Freeman's duty

performance. Sergeant Ackert provided Captain Pfaffenbichler with Letters of Counseling and memos for record indicating Sergeant Freeman had been late for work. *Captain Pfaffenbichler was unfamiliar with the accused because the accused was relatively new to the unit. Captain Pfaffenbichler sought the information to know what member was involved, and not as an effort to secure additional evidence for future prosecution.*

[k] After speaking with the accused's supervisor, and reviewing his PIF and the police report, *Captain Pfaffenbichler called the legal office and conferred with Captain Scholz, the deputy SJA on what should be done. It was determined that sufficient probable cause existed for Captain Pfaffenbichler to authorize a urinalysis search.* Captain Pfaffenbichler had decided a urinalysis should be done, though he did not distinguish the difference between the various modes available. It was his intent to resolve the situation before him. He presented the various facts he had before him to Captain Scholz, including the accused's arrest for DUI and possession of drugs, and the information from the accused's personnel file.

[*l*] After receiving approval for a search, Captain Pfaffenbichler prepared a letter (attachment Appendix I) [omitted] ordering the accused to provide a probable cause urinalysis. This order was given to the accused by Captain Pfaffenbichler.

[m] On 3 June 1991, after determining there was sufficient probable cause to order a urinalysis search of the accused, either Master Sergeant Busse or Captain Pfaffenbichler contacted the hospital laboratory, specifically Captain Ann Johnson, to notify her that the accused was reporting for collection of a urine specimen. Captain Johnson cannot now recall who

telephoned her, but it may well have been Captain Pfaffenbichler. Captain Johnson had requested of commanders that she be given such a courtesy call in these situations, though it is not necessary. Collections will be made when authorized.

[n] A sample was collected from the accused and was tested. This test indicates a presence of the metabolite of cocaine and forms the basis for Specification 2 of Charge II.

[o] The accused was arrested on 2 June 1991 and held in civilian custody until that afternoon. Captain Pfaffenbichler took no action on that day because the accused was being held by the civil authorities.

[p] Captain Pfaffenbichler has no special training in the law of searches and seizures, but he has been a section commander for about two years. He knows that [sic] distinction between "viewing" information and actively "gathering" evidence. *He was not attempting to act as an investigator. His demeanor and responses in court reflected a commander who was earnestly trying to follow established procedures and advice provided him and who wanted to review all possible information on one of his squadron members prior to making a decision.* He was not actively working toward a set result with a view to prosecuting the accused.

(Emphasis added.)

4. Prior to trial on the merits, appellant made a motion to dismiss specification 2 of Charge II—wrongful use of cocaine. In making this motion appellant argued that the seizure of his urine was illegal because the probable-cause urinalysis was not authorized by a neutral and detached commander. Essentially appellant argues that his commander abandoned his impartial role when he advised appellant of his Article 31 rights, requested a civil-

ian Police Report, reviewed appellant's service record, and met with appellant's immediate supervisor.

5. Appellant at trial asserted that then 1st Lt. Pfaffenbichler "was not neutral and detached when he authorized a probable cause search as required under Mil.R.Evid. 315(d) and the Fourth Amendment of the United States Constitution." (App. Ex. I.) The Government on appeal agrees that the appropriate question for review in this case is "[w]hether the commander was sufficiently detached and neutral to issue a search authorization under Mil.R.Evid. 315[,]" Answer to Final Brief at 2, but it argues that the total record supports a conclusion contrary to appellant's claim. We hold that Captain, then Lieutenant, Pfaffenbichler was a "neutral and detached" commander as required by our case law and Manual for Courts-Martial, United States, 1984. *See generally United States v. Lopez*, 35 MJ 35, 41 (CMA 1992). (The 1984 Manual—Mil.R.Evid. 315(d)—added the requirement of impartiality which was intended to incorporate the neutral-and-detached standard of *United States v. Ezell*, 6 MJ 307 (CMA 1979). *See* Drafters' Analysis, Manual, *supra* at A22-27 (1994 ed.).)

6. Appellant's argument of disqualification under the Fourth Amendment and Mil.R.Evid. 315(d) is based on Captain Pfaffenbichler's testimony concerning his pre-authorization activities in this case. He particularly contends on appeal as follows:

> Indeed, after learning of the appellant's arrest by the civil authorities, then Lt. Pfaffenbichler made an extensive inquiry into the matter to include obtaining and reviewing the civilian police report or a summary of it made by the military police, obtaining and examining the appellant's personnel file, soliciting the appellant's supervisor for inputs regarding the appellant, reading the appellant his Article 31 rights and finally, directing the appellant to report

> to the AFOSI in order that he could be interviewed. (R. 15-23). . . .

Final Brief at 6.

7. Appellant also notes:

> As previously stated, Captain Pfaffenbichler represented the lowest level of command, in fact quasi-command, in that he was a unit section commander holding the rank of 1Lt at the time he made the probable-cause determination to seize the appellant's urine. Moreover, as abundantly detailed above, he had absolutely no Fourth Amendment training and was not even briefed on the meaning of probable cause in making the specific determination at issue. . . .

Final Brief at 11.

8. The above argument for disqualification of then 1st Lt. Pfaffenbichler ignores other evidence in this record which negates any suggestion that this officer abandoned his role as a neutral and detached commander in this case. For example, although the above commander advised appellant of his Article 31 rights, it is also a fact that he did not ask appellant a single question about the incident in the civilian community. *See United States v. Guerette*, 23 USCMA 281, 283, 49 CMR 530, 532 (1975); *cf. United States v. Ezell*, 6 MJ at 319. Moreover, although the above commander requested the civilian police report on the off-base incident, it is also true he did not initiate that report or become in any way personally involved in that investigation. *Cf. United States v. Murray*, 12 MJ 139, 141 (CMA 1981); *United States v. Cordero*, 11 MJ 210 (CMA 1981); *United States v. Rivera*, 10 MJ 55, 61 (CMA 1980). In addition, although the above commander reviewed appellant's service jacket and talked with appellant's work supervisor, it was found as fact [j] that appellant was "relatively new to the unit" and he "was unfamiliar" to the commander. *See*

United States v. Rushing, 11 MJ 95, 97 (CMA 1981) (possession of prior knowledge of general-conduct record not type of information to make one predisposed against accused). Finally, although then 1st Lt. Pfaffenbichler was not an officer experienced in the intricacies of determining probable cause, it is uncontroverted that he consulted fully with a judge advocate prior to making his decision. *See United States v. Lopez*, 35 MJ at 42.

9. Viewing this record in its entirety, we have no doubt that then 1st Lt. Pfaffenbichler was a neutral and detached magistrate within the meaning of the Fourth Amendment and Mil.R.Evid. 315(d). A military commander plays a number of roles in our military justice system. One of his roles is as a quasi-judicial officer who can order a search if he remains neutral and detached. However, the impartiality demands of this role may appear to conflict with other functions he performs pertaining to "a commander's responsibility for the maintenance of order and discipline in his command[.]" *United States v. Staggs*, 23 USCMA 111, 114, 48 CMR 672, 675 (1974). For example, in "exercising his responsibilities as a commander," *United States v. Guerette*, 23 USCMA at 283, 49 CMR at 532, a military leader has to "direct and sometimes participate in investigations into criminal activities." *United States v. Staggs, supra.* However, it is only when the commander participates as a law enforcement official or is personally and actively involved in the process of gathering evidence that he loses his right to authorize searches which can produce admissible court-martial evidence. *Id. See* Mil.R.Evid. 315(d); *see also United States v. Ezell*, 6 MJ at 318-19.

10. Requiring military commanders to honor the legal boundaries of their respective roles is crucial to ensuring servicemembers receive the legal protection due them. We have said:

> [T]he fundamental idea behind the requirement that there be authorization to search separate from that

> of the police officer is that the official to whom the request is made brings "judicial" rather than a "police" attitude to the examination of the operative facts. . . .
>
> [AND]
>
> The power to authorize searches is indeed a "judicial function." However, within the military it is not exercised, nor could it be, by a strictly "judicial officer"; it is an incident of command. There is nothing in this case to indicate that the executive officer was less capable of exercising a "judicial" rather than a "police" attitude to the examination of the operative facts.

United States v. Drew, 15 USCMA at 453, 454, 35 CMR at 425, 426, *citing Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Our review of the entire record makes clear that then 1st Lt. Pfaffenbichler did not cross the appropriate line in appellant's case.

The decision of the United States Air Force Court of Military Review is affirmed.

JUDGES CRAWFORD, GIERKE, and WISS concur.

COX, Judge (concurring):

11. I concur, although I would not waste much ink trying to convince readers that this commander was neutral and detached. Elsewhere I have expressed the view that the term "neutral and detached commander" is an oxymoron. *United States v. Lopez*, 35 MJ 35, 45 (CMA 1992) (Cox, J., concurring with modest reservations). I agree here that the search did not violate the Fourth Amendment and was obviously reasonable.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Staff Sergeant RENICE L. FREEMAN, FR265-11-4105
UNITED STATES AIR FORCE

ACM 29714

15 June 1993

Sentence adjudged 21 November 1991 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Kevin L. Daugherty.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of $400 pay per month for 3 months, and reduction to E-1.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

PER CURIAM:

In a fully litigated case before officer members, the appellant was found guilty of operating a vehicle while drunk, possessing and using cocaine, writing six checks with insufficient funds for payment on their presentment, and dishonorably failing to pay a debt, all in violation of Articles 11, 112a, 123a, and 134, UCMJ. His approved

sentence is a bad-conduct discharge, confinement for 24 months, forfeiture of $400 pay per month for 3 months, and reduction to the grade of E-1.

Appellant's problems surfaced when he was stopped by a civilian policeman early in the morning of Sunday, 2 June 1991, just after he drove into the parking lot of his off-base apartment, because of a suspicion of driving while intoxicated. The ensuing exchange between the two parties resulted in appellant's apprehension, search of his person, and testing for alcohol. The alcohol test result of .11 appeared surprisingly low to the apprehending policeman, based on his detection of appellant's slurred speech, odor of alcohol and agitated mood at the time of his apprehension. A search of his private belongings disclosed a bag containing 0.40 grams of cocaine.

Appellant was released from jail later that same day and was ordered to report to his commander the first thing on Monday, 3 June. After advising him of his rights under Article 31, UCMJ the commander sent appellant to the Office of Special Investigations for interrogation. The commander then examined appellant's personnel file, talked with appellant's supervisor and acquired a copy of the civilian police report. From these data, he decided he needed to order a probable cause search of appellant's urine for the presence of cocaine. Prior to doing this, he obtained concurrence from an attorney in the legal office. He next contacted the urinalysis monitor at the hospital laboratory to inform them he was sending appellant to them for a probable cause urinalysis.

Appellant argued both here and at trial that the seizure of his urine was a violation of R.C.M. 315 because the commander who directed the seizure had assumed an investigative role which precluded him from acting in a neutral and detached manner. The military judge found to the contrary and we agree. The commander did not engage in the prohibited practice of becoming personally involved in an evidence gathering process which gave rise

to the incriminating test results. His examination of appellant's squadron personnel records and the civilian police report, and directing appellant to provide a urine sample were routine functions which are expected to be exercised by any commander or magistrate who is called upon to make a probable cause determination. Participating in these activities does not necessarily deprive them of their impartiality. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992); *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979); *United States v. Sloan*, 30 M.J. 741 (A.F.C.M.R. 1990). Appellant's commander's acquiring and reviewing records after the former's arrest did not prevent him from acting in a neutral and detached manner. The commander was not disqualified to order appellant to provide a urine sample and the test results were properly admitted.

In specification 1 of Additional Charge I, appellant was charged with writing two checks to his landlord, both of which were returned for insufficient funds. The language of the specification says they were written for "past due obligations" even though one was written on 12 July 1991, 11 days after the rent due date of 1 July and the other was written on 31 July 1991, 1 day before August rent was due. Appellant asks that we dismiss the findings of guilty for the second check because the language of the specification alleges the check was written for a "past due obligation", when, in fact, it was written 1 day early. Appellant correctly suggests the additional language of "or for any other purpose" should have been included in the specification. This argument was presented at trial at the conclusion of the government's case in the form of a motion for a finding of not guilty and the military judge denied it. Later, without objection from the defense, the judge instructed the members they could find appellant guilty if they found he wrote the two checks "for a past due obligation and for any other purpose." Although we believe the military judge was incorrect in providing an instruction on the elements which exceeded the language

of the pleadings, we view this as a minor variance which did not prejudice the substantial rights of appellant. Article 59(a), UCMJ.

Specifications 1 and 2 of Additional Charge I allege appellant wrote and uttered a total of six checks on two checking accounts knowing there were insufficient funds in these accounts. Appellant asserts the military judge failed to properly instruct the court members of the availability of a mistake of fact defense which is based on testimony elicited during cross-examination of appellant's first sergeant. The first sergeant testified that when he questioned appellant about the bad checks, appellant told him the checks were returned "due to some sort of banking error." With nothing more presented on this issue, we find the evidence was insufficient to require the military judge to have instructed on mistake of fact, even if requested by the defense, let alone be sufficient to generate a *sua sponte* duty on the judge to so instruct. The defense of mistake of fact was not reasonably raised by the evidence. *United States v. Greenfeather*, 32 C.M.R. 151 (C.M.A. 1962).

Additional Charge II alleges appellant dishonorably failed to pay debts to his landlord which developed when the two checks he uttered for the payment of rent for the months of July and August 1991 were returned by the bank because of insufficient funds. Appellant suggests the military judge again violated his duty to provide an instruction *sua sponte* to the members that financial inability to satisfy the debts was a defense. We disagree. Being physically or financially unable to perform a duty can be a defense, but only when it is through no fault of the accused. R.C.M. 917(i). Appellant directs our attention to his bank statements which indicate his bank withdrawals exceeded the deposits for the months in question; therefore, he argues, it is obvious he was "unable" to satisfy the debts. Without proof that this shortage of funds was caused by some person other than appellant,

we are unwilling to find the military judge had a duty to provide this instruction.

Appellant claims that his writing two bad checks for his rent for the months of July and August, 1991 (specification 1, Additional Charge I) and his dishonorable failure to pay a just debt which was based on his failure to satisfactorily pay the rent for those two months (Additional Charge II) are multiplicious for findings. In response to a similar motion at trial, the military judge properly denied appellant any relief, finding the offenses took place at different times, they require proof of separate elements, appellant was afforded the opportunity to avoid committing the dishonorable failure to pay offense, and the offenses reflect different and distinct social standards. *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983); *United States v. Jobes*, 20 M.J. 506 (A.F.C.M.R. 1985), *pet. denied*, 21 M.J. 102 (C.M.A. 1985).

We agree with appellant the government met its burden of proving beyond a reasonable doubt that he owed his landlord for 2 months of rent, but failed to meet its burden of proving he also owed the landlord for charges on personal checks returned for insufficient funds. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); Article 66(c), UCMJ. To correct this legal insufficiency, we approve only so much of the findings of guilty of the specification of Additional Charge II which alleges an indebtedness of $1020 for rent past due; the remaining charged misconduct is disapproved and dismissed.

The remaining assignment of error has been considered and found to be without merit. *United States v. Longhi*, 36 M.J. 988 (A.F.C.M.R. 1993).

Reassessing the sentence because of our disapproval of a portion of the specification of Additional Charge II, we find the sentence approved by the convening authority is appropriate. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

The findings of guilty, as modified, and the sentence, as reassessed, are correct in law and fact and, on the basis of the entire record, are

AFFIRMED

[SEAL]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
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Chief Court Administrator, AFCMR

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